In the Supreme Court of the United States

October Term, 1955

No. 451

RAILWAY EMPLOYES' DEPARTMENT, A. F. of L., ET AL.,

Appellants,

vs.

ROBERT L. HANSON, et al., and UNION PACIFIC RAILROAD COMPANY,

Appellees.

On Appeal From the Supreme Court of Nebraska

PETITION FOR REHEARING OF ROBERT L. HANSON, HORACE A. CAMERON, HAROLD J. GRAU, LEONARD W. KOCH, and WILLIAM A. CORNELL

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PETITION FOR REHEARING

Robert L. Hanson, Horace A. Cameron, Harold J. Grau, Leonard W. Koch, and William A. Cornell, individual appellees, for themselves and others similarly situated, respectfully pray for a rehearing, and in support of their Petition for Rehearing show the Court as follows:

I.

The Court erroneously held that Congress could deprive these appellees and others similarly situated of their most precious liberties without violating the requirements of due process, if Congress could believe that "the long range interests of workers would be better served" by such deprivation of rights.

After it reaffirms the right to work as being included in the concept of liberty within the meaning of the due process clauses, the opinion of this Court reads:

> "The question remains, however, whether the long-range interests of workers would be better served by one type of union agreement or another."

The opinion then proceeds to state that Congress "might well believe that the long range interests of the workers would be served by union shop contracts. Thus this Court announces as the criterion upon which this decision turns a rule that if the legislative authority could believe that the questioned legislation serves the long range interests of the public, then it is valid regardless of the fact that it deprives individuals of their liberty and property. The opinion does not find that Congress did so believe, or that Congress claimed to so believe, or that there was evidence before Congress from which it could come to such a belief. The opinion sustains the legislation because Congress might believe it would serve long range interests.

The adoption of this criterion is the more alarming in that it is announced for the Court by the Justice who only recently wrote:

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live * * *."[1]

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1 Barsky v. Board of Regents, 347 U. S. 442, 472, 473 (1954).

The argument that any legislation is justifiable if it might be believed to serve the long range public interest is alien to our Bill of Rights. It has been used by foreign governments to justify their depriving individuals of life, liberty and property. It has been used to support practically every act of tyranny in history. It could be said that Hitler "might well believe" that the slaughter of three million Jews was for the long range good of Germany." He seems to have been capable of believing anything he was determined to believe. It could be said that Stalin "might well believe" that the extermination of eight million Kulaks was for the long range good of Russia. And the rulers of Red China "might well believe" that a bullet in the back of the head of each of twenty million landlords was for the long range good of China. These governments were not operating under a Bill of Rights similar to that in our Constitution. But in view of the language used by this Court in announcing the criterion upon which this case seems to turn, the question may well be asked, "What difference does it make?" The rule announced and applied by this Court in this case subjects the life, liberty and property of the citizens to the whim of Congress. It is a shocking departure from the rules of due process previously applied by this Court.

II.

The Court erroneously concluded that "Congress might well believe" that union shop contracts "would help insure the right to work in and along the arteries of interstate commerce."

The Court does not elucidate this assertion in its opinion. But preliminary to it is the assertion that

trade unionism has enhanced and strengthened the right to work. The Court does not say how, but perhaps the Court had in mind seniority clauses in collective bargaining agreements, or the influence of unions in obtaining legislation outlawing yellow dog contracts and outlawing employer discrimination against employees on account of their union activities. But it in nowise follows from that, that depriving nonunionists of their right to work enhances and strengthens the right to work of workers generally. The legislative history of Section 2 Eleventh does not indicate that it was intended or expected to enhance and strengthen the right to work in any respect. And if the Court infers that strengthening the union's bargaining position enhances the right to work of its members, we wish to remind the Court that the spokesman for the Railway Labor Executives Association, Mr. George Harrison, told Congress that the union shop would not affect the power of bargaining one way or another. (See our brief, p. 6, Ex. 29; R. 215.) Or if the Court infers that peace on the rails would enhance the right to work, we would remind the Court that industrial peace was not an objective of Section 2 Eleventh. That the Railway Labor Act with its prohibition of union shop contracts had been more effective in bringing about industrial peace than other statutes lacking such prohibition was demonstrated. The statement of the Executive Secretary of the Railway Labor Executives Association in 1948, that the statutory system governing railway labor relations "on the whole, has operated to preserve the railroad industry from serious labor controversies to an extent not as yet approached by any other" (Ex. 27; R. 194), was not

disputed. Other proposed amendments to the Railway Labor Act were pending before Congress at the same time as were the bills which became Section 2 Eleventh. In testifying with regard to them on June 5, 1950, George Harrison said:[2]

> "The railway Labor Act is the result of over a half century of experience with labor legislation, and contrary to what has been said by the Railways' representatives, this law has accomplished its purpose of promoting industrial peace in the railroad industry."

Testifying further he said:[3]

> "It is a matter of common knowledge that in outside industry there are many strikes caused by alleged agreement violations. We are all aware of the fact that work stoppages of many thousands of men do occur in outside industry because of an alleged contract violation which affects only a few employees. It is a remarkable tribute to the success of the Railway Labor Act that work stoppages, in cases involving the interpretation or application of agreements, have been very few in view of the violations which the foregoing figures indicate have occurred."

In the same hearings Mr. D. H. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen, on June 6, 1950, testified:[4]

> "Actually and relatively the railway labor industry has been a symbol of industrial peace."

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2 Hearings before the Subcommittee on Railway Labor Act Amendments of the Committee on Labor and Public Welfare, United States Senate, Eighty-first Congress, Second Session, on S. 3463, at p. 174.

3 Idem p. 177.

4 Idem p. 208.

And Fred H. Nemitz, President, Order of Railway Conductors of America, on June 7, 1950, testified:[5]

> "We have had far fewer strikes with far less drastic consequences to the carriers, the employees and the public than was the case in industry generally. Upon such a relative basis, the Railway Labor Act has accomplished a thoroughly commendable result and should be the subject of commendation rather than of censure."

How this Court manages to come up with the theory that Congress at the time it enacted Section 2 Eleventh "might well believe that it would help insure the right to work in and along the arteries of interstate commerce" remains to us a mystery. Is the writer of this opinion now using the expression, "right to work," with some undefined but different meaning from that for which he used it in his opinions in *Barsky v. Board of Regents*, 347 U. S. 442, 473 (1954), and *Linehan v. Waterfront Commission*, 347 U. S. 439, 440, 441, (1954), or in which this Court used it in *Truax v. Raich*, 239 U. S. 33, 41 (1915); *Smith v. Texas*, 233 U. S. 630, 636, 638 (1914); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923), and *Takahashi v. Fish and Game Commission*, 334 U. S. 410 (1948)?

The right-to-work involved in the foregoing cases is an individual right, a personal liberty. In *Truax v. Raich*, supra, the personal, individual right to work of the alien was upheld by striking down a statute which was enacted for the protection of the employment opportunities of the mass of the citizens of the state. The

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5 Idem p. 289.

statute was entitled: "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona." (239 U. S. 40, 41.) But in the instant case the attitude of the Court seems to be reversed. The individual's right-to-work, the personal liberty of these appellees is subordinated to some vague, undefined mass interest to which for the first time this Court applies the term right-to-work.

Whose so-called right-to-work is it that "Congress might well believe" Section 2 Eleventh would help insure? And why is it that "Congress might well believe" such a thing when the first suggestion of such a notion comes, not from counsel for the Railway Labor Unions, nor from Congress in the statute or committee reports or otherwise, nor from the sponsors of the bills before Congress, but from this Court in its opinion in this case? To justify a statute under whose authority the right to work of nonunionists is taken away, by suggesting that Congress might have believed that in some unidentified way the statute might help insure some other unidentified right to work is a vast departure from the rules heretofore applied by this Court in determining whether individuals have been deprived of their most precious rights and liberties without due process of law.

III.

The Court erroneously failed to apply the rules of due process heretofore announced and applied by this Court in similar cases.

In *Slochower v. Board of Education of City of New York*, ____ U. S. ____, 100 L. Ed. (Adv.) 449 (April 9, 1956), the majority of this Court found the dismissal of

a Brooklyn College teacher to violate due process of law although his employment was terminated pursuant to a New York City Charter provision conditioning the right to work of city employees on their not utilizing the privilege against self-incrimination to avoid answering a question related to their official conduct. Slochower had refused to answer certain questions regarding his membership in the Communist Party. This Court referred to the case as being one involving "the problem of balancing the state's interest in the loyalty of those in its service with the traditional safeguards of individual rights." This Court protected the right to work of the teacher although recognizing the importance of the state's interest in the loyalty of its employees. But in the case at bar, this Court, if it recognized the "problem of balancing" at all, balanced the right to work of several hundred thousand nonunion railway employees against some other unidentified and undefined right to work so obscure that until this Court discovered it no one else knew it was involved, and this Court found that the nonunionists' right to work was not entitled to constitutional protection. In the Slochower case this Court cited *Weiman v. Updegraff*, 344 U. S. 183 (1952), where this Court struck down a so-called loyalty oath because it based employability solely on the fact of membership in certain organizations. But in the case at bar where employability in the railroads is based on membership in labor organizations, this Court says:

> "The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises."

This sentence says that all that is required of a federal statute to make it constitutional is that it be relevant to the commerce power of Congress. But railway employees, like college professors, have convictions with regard to what organizations they should or should not join, and resent arbitrary interference with their freedom. The opinion in this case fails to make clear why the rights of railway workers involved in this case turn on a mere question of policy to be decided by the legislative branch, while comparable rights of teachers suspected of being Communists are protected by this Court in spite of the fact that the policy question in their cases had been determined by the legislatures.

At page 8 of the opinion the power of Congress under the Commerce Clause is compared to the police power of the states. In *Meyer v. Nebraska,* 262 U. S. 390 (1923), another case in which this Court upheld the right to work of a school teacher, this Court in referring to the right to work, at 262 U. S. 399, 400, said:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts."

Does this Court now repudiate that statement?

Does this Court intend to repudiate its former statement that "not even resort to the commerce clause can

defy the standards of due process,'"[6] a statement which has heretofore been accepted as axiomatic?

Does this Court intend to repudiate its former statement that a requirement of due process is "that the means selected shall have a real and substantial relation to the object sought to be attained"?[7] Even assuming that an object of Congress was as this Court says—"industrial peace along the arteries of commerce," can the relation of the statute to such objective be real and substantial when it was so obscure that neither Congress nor union counsel saw fit to claim that it existed?

Does this Court mean to repudiate its former ruling that statutes which go beyond the necessities of the case in infringing individual rights of liberty and property are unreasonable?[8]

Does this Court repudiate its real and present danger rule which it has long applied in cases involving the individual's "most precious" liberties? In *United States v. C. I. O.*, 335 U. S. 106, 140 (1948), a case involving the right of a labor leader and a union to spend its money to help elect a candidate for Congress, the members of this Court who were unwilling to go so far as to give the Federal Corrupt Practices Act a construction contrary to its plain language, said:

> "But when regulation or prohibition touches them [First Amendment Freedoms], this Court is duty bound to examine the restrictions and to de-

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6 Secretary of Agriculture v. Central Roig Refining Co., et al., 338 U. S. 604, 616 (1950).
7 Nebbia v. New York, 291 U. S. 502, 525 (1934).
8 House v. Mayes, 219 U. S. 270, 285 (1911).

cide in its own independent judgment whether they are abridged within the Amendment's meaning. That office cannot be surrendered to legislative judgment, however weighty, although such judgment is always entitled to respect.

* * * * *

"For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, * * *."

Are not the rights of the workers entitled to the same consideration given to labor leaders and to unions?

Does the Court now substitute its statement, "for we pass narrowly on" the statute, whatever that may mean, and broad though the statute may be, for its former clear requirement that "statutes restrictive of or purporting to place limits to those [First Amendment] freedoms must be narrowly drawn to meet the precise evil the Legislature seeks to curb?[9]

We submit that if this Court were to apply the rules of due process as it has heretofore announced them, it would be impelled to a different result in the instant case.

IV.

The Court erred in finding that "The only conditions to union membership authorized by Section 2 Eleventh of the Railway Labor Act are the payment of 'periodic dues, initiation fees, and assessments'."

If the Court means what the sentence quoted above from page 9 of its opinion says, it is construing the stat-

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9 U. S. v. C. I. O., 335 U. S. 106, 141, 142 (1948), and cases there cited.

ute in a way not permitted by the language of the statute or by its legislative history. The Court uses the same kind of language on page 12 of its opinion where it says, "No conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.'."

But conditions to union membership and conditions to employment are two different things. The only condition to employment authorized by Section 2 Eleventh is that "all employees shall become members of the labor organization," provided that that condition is not valid "with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable," or "to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments." Section 2 Eleventh does not prevent the railway labor unions from making any conditions to union membership they may take a notion to make. Representatives of Negroes asked Congress to prohibit the railway unions from excluding Negroes from membership, but their efforts were opposed by the white labor leaders, and the effort to amend the bill that became Section 2 Eleventh to that end failed. (Congressional Record, Ex. 31, p. 16,538.) The position of the Negroes was presented to the congressional committees by Clarence Mitchell (Ex. 29, p. 285; Ex. 27, p. 242), Theodore E. Brown (Ex. 29, p. 273; Ex. 27, p. 230) and Joseph C. Waddy (Ex. 29, p. 285; Ex. 27, p. 242). In his testimony at Exhibit 29, page 302, Mr. Waddy said that without the requirement that the union must accept Negroes into full membership, a statute authorizing union shop contracts would be damaging to the Negroes because it would

bring about an intensification of the effort to separate the Negro firemen from their jobs, so that the union could have 100 per cent union membership without accepting Negro members.

There is nothing in Section 2 Eleventh to prevent the union from expelling a member for any reason or for no reason at all. Under Section 2 Eleventh a railway employee may be compelled to become a member of a union and be compelled to pay life insurance premiums as part of his union dues, but after he has paid on this insurance in this manner for many years so that it has a substantial value to him, he may be arbitrarily deprived of its benefits by being expelled or suspended from the union, and Section 2 Eleventh gives him no protection against such union action. If this Court really thought that the only conditions to union membership authorized by Section 2 Eleventh are the payment of dues, fees and assessments, the Court should have another look at the statute and its legislative history.

The Senate Committee Report on Section 2 Eleventh (Ex. 28; 3, 66) states (at p. 2):

> "The bill attaches two conditions to the execution of union-shop agreements:
>
> "First, the agreement may not require membership in the labor organization as a condition of employment with respect to employees to whom membership is not available on the same terms and conditions as are generally applicable to any other members. Under this provision a labor organization cannot require union membership as a condition of employment if it refuses to accept the membership of persons of certain classes or offers them only limited membership.

> "The second condition set up is that the agreement may not require membership in the labor organization as a condition of employment with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments uniformly required as a condition of acquiring or retaining membership. The effect of this condition is to remove from the requirements of any union-shop agreement those employees to whom membership has been denied or who have been expelled from membership for any cause except nonpayment of dues, fees, and assessments. In such cases, nonmembership in the labor organization could not be used as the basis for the dismissal of the employee by the carrier."

See also pages 3 and 4 of the above report and page 5 of the House Committee Report (Ex. 30; 3, 66).

Section 2 Eleventh does not amend the unions' constitutions and by-laws. And although the unions had plenty of time between the enactment of Section 2 Eleventh and the commencement of this suit to amend their constitutions and by-laws to confine their functions to collective bargaining and make membership less objectionable to many railway employees, they have not done so, and they remain private social, fraternal, insurance, and political organizations, as well as collective bargaining representatives of railway employees.

From the statute itself and its legislative history, it is clear that Congress intended to leave with the unions the full power to make their own conditions of membership. The thing that is not clear is the question of whether by the language we have quoted from the opinion of this Court to the contrary, the Court is giving the statute a

different interpretation in an effort to so construe it as to avoid holding it unconstitutional. If it is, then we would like to remind the Court that it has stated the rule to be that if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, the construction which will save the statute from constitutional infirmity will be adopted. We submit that this statute is not reasonably susceptible to the construction which the Court appears to be putting upon it.

V.

The Court erred in construing the statute to permit only the collection of dues, fees and assessments for the work of the union in the realm of collective bargaining.

At page 9 of the opinion the Court says:

> "The financial support required relates, therefore, to the work of the union in the realm of collective bargaining."

At page 12 of the opinion the Court says:

> "We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendment."

If this Court by these statements is construing Section 2 Eleventh only to authorize the collection of dues, fees and assessments for the support of the collective bargaining process, then we submit that the statute is not reasonably susceptible to any such interpretation.

Congress knew that union dues were used to support the life insurance programs of the unions. Congress knew that union dues, fees and assessments were used to support the unions' activities in lobbying before Congress and state legislatures. Congress knew that the union dues were used to pay for the political and economic propaganda of the unions. Congress knew that union dues were used to pay the expense of the social and fraternal affairs of the unions. And yet, knowing all these things, Congress put no restrictions on the purposes for which the dues, fees and assessments might be collected and spent, and no restriction on their amount except that they be uniformly required.

There is nothing in the record to show an intention on the part of Congress to limit the purposes for which the unions could use the money. To be sure, the argument that was presented to Congress was the free rider argument, and the purported purpose of the statute was the elimination of free riders. But, had Congress intended to limit the statute to the justification claimed for it, the statute could have been narrowly drawn to accomplish that purpose. (See pp. 93, 100, our brief.) But it was not so narrowly drawn. The unions really wanted more than a contribution from each railway employee of his share of the expense of collective bargaining. They wanted the money for all these other purposes. They wanted Section 2 Eleventh as an opening wedge to the removal of more statutory protection of working people from the tyranny of unions. The unions' future plans in this respect are indicated by Mr. Harrison's testimony (R. 212) where he says:

"While we firmly believe that there should be no statutory prohibition against union shop agreements which permit the exercise of union discipline even to the extent of requiring the discharge of an expelled union member, we do not *at this time* seek such authority." (Emphasis ours.)

That the unions wanted more than a contribution to the expense of collective bargaining is further indicated by their stress of the requirement of joining the union. This is emphasized by their spokesman in his testimony (R. 221) as follows:

"Mr. O'Hara: So the important thing in this bill is the check-off. Is that a fair statement or not?

"Mr. Harrison: No; I think the first thing is the requirement that all of the employees subject to the collective bargaining agreement must join the labor union making the collective-labor agreement, and then the second thing is that they must pay their dues to the union * * *."

The unions drafted the legislation and Congress enacted it into law. The very idea of being prevented from using dues collected under compulsory membership contracts for political and other purposes not germane to collective bargaining representation is anathema to the unions. On January 30, 1956 (Congressional Record, p. 1309) Senator Curtis (R., Neb.) and Senator Goldwater (R., Ariz.) introduced a bill (S. 3074) which would amend the National Labor Relations Act to provide that no union could have a union shop contract unless it filed an affidavit that it had not within the preceding two-year period made political expenditures or contributions in a federal election. In his syndicated newspaper column of February 20, 1956, Victor Riesel reported as follows:

"Down in Florida, I saw AFL-CIO President George Meany almost chew his traditional cigar in half when he talked of the Curtis-Goldwater bill.

"Mr. Meany said this would wipe out the labor movement and he had no intention of sitting by and letting this get any place in the Senate."

Why would this Court assume that labor leaders with this attitude toward the use of union dues for political purposes would draft and lobby through Congress a bill which would limit their use of union dues money to financial support of the work of the union in the realm of collective bargaining? The statute is not reasonably susceptible to such an interpretation.

VI.

The Court erred in overlooking the fact that the injunction in this case runs, not against a statute, but against carrying into effect a contract.

While there is precedent for construing a statute to avoid finding it unconstitutional (but only when the statute is reasonably susceptible to such an interpretation), the Court apparently is here likewise interpreting this union shop contract to require nothing more than a contribution of financial support of the collective bargaining agency for its work in the realm of collective bargaining. But the contract (R. 6ff) requires that the employees "shall, as a condition of their continued employment • • • become members • • • and maintain membership" in the union provided he shall not be required to become or remain a member "if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments."

Whatever the meaning of "shall become members" may be in the statute, for the contract that expression must be construed together with the supplemental agreement (R. 17) which exempts from the requirement of joining the union certain members of religious groups if they nevertheless agree to and do pay all the initiation fees, dues and assessments that others are required to pay. The parties to the contract obviously thought that the requirement of membership was something additional to the requirement of a tender of dues, fees and assessments.

That the parties understood that the contract required more than payment of dues, fees and assessments is further evidenced by the correspondence between them. Exhibit D (R. 92) shows that the unions were insisting on "a full union shop" and "were interested in nothing less than a complete union shop agreement which would compel all railroad employees to join a union," while the western railroads wanted to discuss other possible forms of a union security agreement, but reiterated that they were "not willing to make an agreement which compels a man to join a union against his will in order to earn a living." Under threat of strike the Union Pacific capitulated and signed the "full union shop agreement" demanded by the union. Under this type of contract the unions have succeeded in obtaining the discharge of an employee who tendered the initiation fees, dues and assessments, but failed to join the union, Pan American World Airways, Inc., and Brotherhood of Railway & Steamship Clerks, etc., 20 Labor Arbitration Reports 312 (1953). While this Court at page 9 of its opinion says:

> "To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. * * * no more has been attempted here."

and in saying so apparently was eliminating the union membership requirement from Section 2 Eleventh by construction in order to preserve its constitutionality from attack on the ground that it violates freedom of association, this Court has not specifically so construed the contract. Is not the contract then, in this respect, outside the protection of Section 2 Eleventh, and was not the injunction against carrying it into effect correctly issued even though Section 2 Eleventh be construed as this Court apparently has construed it?

Furthermore, this contract says nothing about the fees, dues and assessments being limited to "support of the work of the union in the realm of collective bargaining." The record in this case shows that the dues the contract requires to be paid include life insurance premiums, which run as high as $1.30 per month per employee (See record references at p. 14 of our brief). These premiums are not germane to collective bargaining. And the employee has no assurance that he will ever get the benefits of the insurance he is thus forced to pay for. For his insurance may be forfeited if the union takes disciplinary action against him on account of his independent thinking or the exercise of what we had supposed was his right of free speech. Provisions of union constitutions under which such action can be taken are set out in footnote 9B of this Court's opinion in the instant case.

The record in this case shows that under this contract and the union constitutions and by-laws, railway

employees are required to pay money to the unions for charitable purposes, which is a purpose not germane to collective bargaining. It shows that one union takes 20 cents per year from each union member's dues for charity (Ex. 11, R. 146). If the Court were willing to take judicial notice of the facts of general knowledge, as it usually seems willing to do in considering such cases as this, the Court would know that unions make donations to religious and charitable organizations in very substantial amounts which are not germane to collective bargaining (Our brief, pp. 71 to 75).

The record in this case shows that under this contract and the union constitutions and by-laws, railway employees are required to pay money to the unions for political purposes. Union constitutions provide for political education of the members (Ex. 10, R. 142). Union dues are used to pay for publications such as the weekly paper "Labor" (Ex. 10, R. 143), and each union has its own official publication (Ex. 11, R. 142; Ex. 9, R. 135) "for the propaganda of the organization" (Ex. 15, R. 151). These publications are paid for by the union members' dues, and mailed to the members. Thus the forced union member is required to pay for his own political and economic indoctrination. Lobbying is to be paid for out of union dues by the locals sending to the international such an amount as 10 cents per member per quarter (Ex. 10, R. 144). The record shows that union dues have been used by railway labor unions to elect or oppose candidates for public office such as United States Senators (Ex. 31, R. 255).

Under *this* contract, *this* record shows that workers are required to contribute dues to the union for pur-

poses which do not relate "to the work of the union in the realm of collective bargaining," but which are "purposes not germane to collective bargaining," to quote the expressions used on page 9 of this Court's opinion. Therefore, if this Court has sustained Section 2 Eleventh on the theory that the financial support required by it relates to the work of the union in the realm of collective bargaining, as this Court appears to have done, then appellees should be entitled to an affirmance of the injunction against carrying this contract into effect since the record shows that the dues, initiation fees and assessments required by it will be used for purposes not germane to collective bargaining.

VII.

The Court erred in comparing the compulsory union membership requirement of the union shop contract in the instant case with the integrated bar.

At page 11 of the opinion the Court says:

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

Here, the Court lost sight of the distinction between being compelled to take affirmative action to become a member of a private organization on the one hand, and on the other hand being automatically included as a part of an arm of the government itself. The Court also overlooked the distinction between the right to work for a living in common occupations of the community, and the privilege of being an officer of the court—a member of the bar.

The Bar of Nebraska was integrated by order of the Supreme Court of Nebraska. The opinion of the court and the rules creating, controlling and regulating the Nebraska State Bar Association are set forth in *Re Integration of Nebraska State Bar Association*, 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151 (1937). All lawyers resident in and licensed to practice in Nebraska were made members, not by any affirmative act of their own, but by the rules establishing the integrated bar. It is a part of the judicial branch of the government of Nebraska, and is subject to the control of the Supreme Court of Nebraska. In the annotation, 114 A. L. R. 161, a number of similar decisions with regard to integrated bar associations of other states are discussed. One case quite pertinent to this discussion is *Re Scott*, 53 Nev. 24, 292 Pac. 291 (1930), rehearing denied, 53 Nev. 48, 296 P. 1113 (1931). There the court rejected a contention that an act providing for the integration of the bar violated the fundamental principles of government in that those engaged in the practice of law were compelled to accept membership in a corporation in order to practice their profession. The court said: "This contention furnishes the most popular criticism of the members of the profession opposed to the law. As hereinabove stated, the membership, character, and conduct of those entering and engaging in the legal profession has, since the inception of our state government, been regarded as the proper subject of legislative regulation and control; the right to follow any of the common industrial occupations of life does not extend to the pursuit of professions or vocations of such a nature as to require peculiar skill or supervi-

sion for the public welfare. In the adoption and approval of the legislation under review, the legislature evidently considered that the time had come in the administration of the law that attorneys and counselors at law, who constitute an integral and indispensable unit in the administration of justice, should be organized as a body politic, with delegated police power subject to the control of the supreme court and the legislature in a matter of great public concern."

The practice of law is a privilege. *Petition for Integration of Bar of Minnesota,* 216 Minn. 195, 12 N. W. 2d 515, 518 (1943). The integrated bar is not a private association but an official governmental body. *State Bar v. Superior Court,* 207 Cal. 323, 278 P. 432, 434 (1929).

But Congress did not make the railway labor unions into governmental subdivisions or agents. It delegated to them the power of compulsion, the power of taxation. But they remain private associations, not governmental bodies.

VIII.

The Court erred in holding in effect that Congress may delegate to a private organization the power to tax.

On page 12 of its opinion, this Court said, "We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress * * *."

But the opinion did not consider the point we made at page 100 of our brief that an attempt to impose a tax for the benefit of a private organization is an unconstitutional deprivation of private property without due proc-

ess of law. We there cited *The Citizens Savings & Loan Assn. v. Topeka,* 21 Wall. 655, 87 U. S. 686, 22 L. Ed. 455 (1874), where this Court said at 20 Wall. 665:

> "In the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

Similar cases are *Commercial National Bank v. Iola City,* 154 U. S. 617, 14 S. Ct. 1199, 22 L. Ed. 463 (1874); *Parkersburg v. Brown,* 106 U. S. 487, 1 S. Ct. 442, 27 L. Ed. 238; and *Cole v. LaGrange,* 113 U. S. 1, 5 S. Ct. 416, 28 L. Ed. 896.

In the instant case Congress has gone even one step farther than imposing a tax for the support of a private organization. It has delegated to the private organization the power to impose a tax.

If Congress can do this, then Congress can delegate to business men's organizations the power by restraint of trade or other coercive measures to enforce financial contributions to trade associations from those who are presumably benefited by their activities but who would

prefer to have no part of such associations. Indeed it would seem to follow that Congress can authorize the use of all kinds of coercion by private organizations to compel contributions from those they claim to be benefiting. There is nothing in the opinion of this Court in the instant case to indicate that this aspect of its holding was given any consideration.

IX.

The Court erred in placing upon appellees the burden of showing that the money they are required to pay under the union shop contract as union fees, dues and assessments will be used for purposes not germane to collective bargaining, and in finding that that burden of proof had not been satisfied.

On page 9 of the opinion this Court said:

> "The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of 'fines and penalties' precludes the imposition of financial burdens for disciplinary purposes. If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented."

The Court's opinion does not inform counsel as to what purposes would be not germane to collective bargaining. But we think it is clear that the record in this case—testimony and documents which have been received in evidence—shows that the union dues will be used for a number of purposes not germane to collective bargaining. The record shows that union dues will be used to pay for insurance benefits of which the union may deprive the individual worker through disciplinary proced-

ure, to pay for charitable donations, to pay for the dissident individual's own political and economic indoctrination through union publications, to pay the salaries and expenses of lobbyists before state legislatures and before Congress. We have pointed out that the record shows that the railway labor union dues in the past have been used to support or oppose candidates for public office. This evidence in the record is supplemented by matter of of common knowledge with regard to political activities and charitable donations of unions out of union dues. All this the opinion of the Court seems to overlook.

The Court seems to deny appellees relief because they have not proved that the union intends to use the specific funds appellees will be required to pay as union fees, dues and assessments for a purpose not germane to collective bargaining. Assuming that paying out union dues money to defray the expense of electing a candidate to public office would be "not germane to collective bargaining," this Court seems to put the burden on appellees to prove that their dues money will be so used.

This, we submit, makes a mockery of justice. These funds collected as dues today, may be placed on deposit by the union and mingled with other millions of dollars the unions now have on hand. Years hence they may be transferred from the union to some other organization such as the Railway Labor Executives Association. Later that organization may spend the money for such political purposes. The Railway Labor Act does not require the unions or their transferees to account to their members or to the government or to anyone else for the expenditure of these dues funds. The member is not given the

right to know how his dues money is spent or how it will be spent. He would be able to find out, if at all, only through litigation and accounting and discovery procedure which would involve prohibitive expense.

What the Court appears to be doing is to recognize that the dues of union members will probably be spent by the unions in part for purposes not germane to collective bargaining, but to deny the worker any effective remedy.

The statute literally interpreted authorizes the union to collect dues, fees and assessments without restriction as to purpose and without limitation as to amount. Without saying so the Court seems to be repudiating the rule that

> "the question [of the constitutionality of a statute] is to be determined by what may be done under and by virtue of its authority, not by what has been done under an act in any particular instance." 11 Am. Jur. 737, Constitutional Law Sec. 102.

This textbook rule is supported by the citation of many cases, including two from this Court. In *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 170, 38 L. Ed. 398 (1893), this Court approved the test laid down by the Court of Appeals of New York as follows:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

And in *Eubank v. Richmond*, 226 U. S. 137, 144, this Court said:

> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances

it enables"

deprivation of property without due process.

The decision of this Court departs from the rule of the above cases. It is little protection to the constitutional rights of the railway worker to tell him that the statute really only authorizes the union to force him to pay fees, dues and assessments for the support of the collective bargaining process, while at the same time requiring him to pay all that the union demands because he cannot predict with absolute certainty what use the union will eventually make of the money.

X.

The Court erred in holding that Section 2 Eleventh was within the commerce power of Congress, that the objective of the statute was industrial peace along the arteries of commerce, and that Congress chose the union shop as a stabilizing force.

On page 8 of the opinion the Court says:

> "The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next."

The legislative history of Section 2 Eleventh makes it clear that the union shop was not anathema to Congress, but it makes it equally clear that Congress did not consider it needful to industrial peace. The evidence was undisputed that under a statute prohibiting union shop contracts the record of the railroad industry for industrial peace and stabilized labor-management relations was much better than that of other industry under a statute permitting union shop contracts.

Nowhere in Section 2 Eleventh or in the Congressional committee reports was there any claim made that Section 2 Eleventh would tend to bring about or preserve industrial peace, or would stabilize labor-management relations in the railway industry. Nor did this Court get the notion that the Congressional objective in Section 2 Eleventh was industrial peace in the railway industry from union counsel. Their argument on the commerce power was that the subject of union shop agreements had been "a prolific source of labor disputes" (p. 19, Railway Labor Executives Assn. brief); that it was within the Commerce Power to eliminate that prolific source of labor disputes by prohibiting union shop contracts; and that if Congress could ban that source of disputes, Congress could also bring back that source of disputes. We answered that eliminating a prolific source of labor disputes was within the Commerce Power as being "reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders," quoting the rule laid down by this Court, but that bringing back into the area of labor-management conflict a prolific source of labor disputes could not so qualify as an exercise of the Commerce Power. We pointed out that the natural operation and effect, indeed the actual operation and effect of Section 2 Eleventh was to bring about the danger of strikes and their attendant disorders, so much so that in the judgment of the National Mediation Board they threatened "substantially to interrupt interstate commerce to a degree such as to deprive this country of essential transportation services" (Ex. E, R. 95).

This Court rejected the arguments of union counsel and adhered to its established rule that the authority of Congress in labor relations under the Commerce Power is to adopt appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation."

Then this Court proceeds to discover a fact which neither Congress nor union counsel were able to discover, namely, that bringing back into the area of labor-management conflict a "prolific source of labor disputes" which had been previously eliminated was intended by Congress to promote industrial peace in the railway industry. Previously this Court had taught Congress to tie legislation to the Commerce Clause by legislative findings. Is the teaching of this decision that this Court will supply the essential findings which neither Congress nor counsel defending the statute were willing to suggest?

The concurring opinion assumes that Section 2 Eleventh is an "exercise by Congress of its power under the Commerce Clause to promote peaceful industrial relations" and seems to argue that after that assumption is made anything further that can be said would raise "questions not of constitutional validity but of policy."

The opinion cites *Adair v. United States*, 208 U. S. 161 (1908), which found the railroads' liberty of contract to overbalance the workers' freedom of association which the Congressional enactment there questioned sought to protect by outlawing yellow dog contracts. The opinion seems to argue that since this decision is no longer law, and statutes protecting the workers' freedom of association are now upheld, Section 2 Eleventh, which infringes

the nonunion workers' freedom of association and right to work should also be upheld. It argues that since Mr. Justice Holmes in his dissent in Adair asserted the validity of a statute which fostered union membership by protecting the employees' freedom to join or not to join, the instant statute under which workers are deprived of their freedom not to join is also valid. This concurring opinion seems to further demonstrate that in considering this case this Court lost sight of the line that divides freedom from compulsion, and forgot that even an exercise of the commerce power is subject to the requirements of due process.

"We have come full circle from the point of view in the *Adair* case," says the concurring opinion. This is reminiscent of the similar remark made by Mr. Justice Jackson, dissenting in *Hunt v. Crumboch*, 325 U. S. 821, 830, 831 (1945), where he said:

> "With this decision the labor movement has come full circle. * * * This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor, so long, so bitterly and so rightly asserted should belong to no man."

Yes, we have come full circle from the *Adair* holding that railroads could deprive workers of freedom of association by yellow dog contracts. This Court now permits to unions that same arbitrary dominance over the workers' rights, and sustains the union counterpart of the yellow dog contract—the union shop contract by which

those workers who are unwilling or unable to join unions are deprived of their freedom of association and right to work.

The concurring opinion further recites that the railroads, subsequent to the *Adair* case, changed their attitude toward railway labor unions and have cooperated with the unions, even to the extent of joining with the unions in 1926 in writing the Railway Labor Act and asking Congress to enact it. This is quite true. But it is equally true that all of the railroads vigorously opposed the enactment of Section 2 Eleventh, and told Congress that it was not needed, and that it would not be beneficial to labor-management relations in the railway industry. Railways were no less anxious to preserve industrial peace in 1950 than they were in 1926, but with reference to the 1950 statute it would seem that the 1950 attitude of the railways which this Court ignores would be of more significance than their 1926 attitude which the concurring opinion stresses.

The concurring opinion continues with "we are now asked to declare it beyond the power of Congress to authorize railroads to enter into voluntary agreements with the unions * * *." The use of the word "voluntary" here may indicate that the writer of the opinion, and perhaps other members of the Court, failed to understand that no railroad wanted the union shop, that all railroads opposed the enactment of Section 2 Eleventh, but their representatives testified before Congress that if Section 2 Eleventh were enacted they would probably be forced to sign (see p. 18 ff our brief). Section 2 Eleventh, superimposed, as it was, upon other sections of the

Railway Labor Act and the general law on the subject, gave the unions the right to strike to enforce their demands for compulsory unionism. It gave them the right to bludgeon the railroads into submission on this point. The use of the word "voluntary" in connection with a union shop contract is not only obsolete, it has become ludicrous. The appellants have conceded that the Union Pacific did not want a union shop contract (p. 20, our brief). To quote from a brief filed by the Union Pacific in this case in the District Court,

> these union shop agreements were not sought by the Union Pacific, but were entered into only after the ultimate in pressure short of an actual strike had been exerted by the defendant unions upon the Union Pacific."

Perhaps our discussion of the concurring opinion does not tie in too well with the caption of this subdivision. We have discussed here because, like the majority opinion, it seems to assume a set of facts other than the facts in the case as a basis for assuming that the statute is a valid exercise of the commerce power, and for assuming that the only question involved was the policy question for Congress to decide as to whether it should "regulate commerce" by legalizing compulsory unionism in the railroads.

XI.

The Court erred in reversing the decision of the Supreme Court of Nebraska.

The Supreme Court of Nebraska decided this case on the basis of the statute as written and the record in this case. The statute purports to legalize contracts condi-

tioning railway employment on the employee's becoming a member of a union and paying initiation fees, dues and assessments without limitation as to amount or restriction as to the purpose for which the union may spend the money. The Supreme Court of Nebraska held that statute to be unconstitutional because it violated the requirements of due process in depriving workers of their freedom of association, the freedom to join or not to join an association with others, a freedom granted by the First Amendment, in depriving workers of their right to work, and in depriving them of their money in the form of initiation fees, dues and assessments which money the union can and does use for purposes other than the cost of collective bargaining—for purposes that include life insurance, welfare funds, strike funds, and propaganda for economic and political principles which may be anathema to the worker. The Nebraska Court said that forcing an employee to join a union and compelling him to financially support principles, projects, policies, or programs in which he does not believe and does not want, and which may be abhorrent to him is clearly a taking of his property without due process. The Court said:

> "Assuming it would be reasonable for [Congress] to require all employees receiving benefits from collective bargaining agreements to contribute their proportionate share of the cost thereof, a question not before us and one which we do not decide, we are nevertheless of the opinion that it can not be done in the manner in which it was here attempted."

But the Supreme Court of the United States seems to attempt to torture this statute and this record into the case and the question which the Supreme Court of Ne-

braska specifically recognized as "a question not before us and one which we do not decide." We submit that this Court should grant a rehearing and should proceed to decide this case, the case the Supreme Court of Nebraska decided, instead of the case which this Court apparently decided—the case of the supposititious statute which calls only for financial support of the collective bargaining process.

CONCLUSION

The individual appellees submit that unless a rehearing of this case is granted, their case will not have had the consideration from this Court to which it is entitled. Section 2 Eleventh was designed to force some 300,000 nonunion railway employees into union membership or out of their jobs. Many union members also oppose compulsory unionism because it deprives them of their most effective means of making union leadership responsive to the membership—their right to protest by withholding their support. The only opportunity these people have had to be heard in this Court is through this case.

Although this case was an appeal from the unanimous decision of the Supreme Court of Nebraska holding a federal statute unconstitutional, this Court put the case on the summary docket thereby reducing the time allowed appellees' counsel for oral argument to one-half hour instead of one hour. Appellees' counsel filed a motion to remove the case from the summary calendar and to place it upon the regular appellate calendar, and supported

that motion with a showing that one-half hour on a side is entirely inadequate for a proper presentation of the factual background and the legal propositions involved in this case. In an effort to prevent appellees' counsel from making an adequate oral presentation of the case, the appellants' counsel filed an Opposition to Appellees' Motion. This Court denied appellees' motion and appellees' counsel was permitted only one-half hour for oral argument.

In its opinion in this case this Court found no merit in any of the arguments made by appellants' counsel, but proceeded to decide the case in favor of appellants on theories and arguments raised by this Court itself. Since these arguments were made for the first time in this Court by the Court itself, appellees' counsel have had no opportunity to meet them by brief or oral argument, and their first opportunity to do so has been in this motion for rehearing.

Furthermore, the decision of this Court is so revolutionary, and its implications as to lack of protection afforded by the Bill of Rights to personal freedom are so foreboding, that the opinion should not be permitted to stand except after careful re-examination by the Court after consideration of additional briefs and oral argument of counsel.

The individual appellees respectfully submit that their motion for rehearing should be sustained.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Edson Smith, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDSON SMITH

Counsel for Petitioners